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No. 79-900

In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

STANDARD OIL COMPANY OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Despite its disclaimer to the contrary (Resp. Br. 14), respondent would require the district court—during the pendency of ongoing adjudicatory proceedings—to conduct a factual inquiry to determine how the Commission went about exercising its discretion in deciding to issue an administrative complaint against respondent and seven other major oil companies. As we have demonstrated in our opening brief (at 23-48), this is precisely the sort of judicial inquiry that is barred by the discretionary function exception of the Administrative Procedure Act, 5 U.S.C. 701(a)(2). Moreover, respondent's contentions confirm that any judicial inquiry into whether the Commission made a "reason to believe" determination is inseparable from the merits of what constitutes "reason to believe," and cannot

be conducted without probing the minds of the Commissioners. See *Boise Cascade Corp.* v. *FTC*, Civ. No. 80-305 (D. Del. Sept. 30, 1980), slip op. 9.

Respondent claims "not that the allegations of the Commission['s] complaint fail to state a claim on their face, but that the Commission failed to determine whether there was *any factual basis* for believing that [respondent] had violated section 5" (Resp. Br. 16 (emphasis added); see also *id.* at 17, 22; J.A. 15). In order to verify respondent's claim, the district court would first have to review the materials that were before the Commission when it voted to issue the complaint (see Resp. Br. 17). But this would be only the beginning of the inquiry. If the district court is to decide whether the Commission made a proper "reason to believe" determination, it presumably would also have to consider whether the materials before the Commission were sufficiently substantial or persuasive to support a finding that there was reason to believe that a violation had occurred (see Resp. Br. 18). Yet even the court of appeals held that review was foreclosed on this issue (J.A. 58).

The district court would next have to consider whether the Commissioners had personally made the necessary "reason to believe" determination. This would entail an inquiry into whether the Commissioners had adequately studied the materials, had deliberated sufficiently, both individually and collectively, and had refused to permit congressional concern over the then current oil shortage to become a dispositive factor in their decisions. This is, of course, the very kind of inquiry that this Court has consistently eschewed, absent extraordinary circumstances. See, *e.g.*, *United States* v. *Morgan*, 313 U.S. 409, 422 (1941); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971).[1]

[1] That such a probing of the Commissioners' minds would inevitably result from judicial review of whether a reason to believe determination had been made is indicated by the type of discovery respondent has signaled that it wishes to undertake. It poses the following hypothetical: "Suppose the Commission's files contain the memorandum of a Commissioner saying 'We do not have anything to indicate

2. Respondent nevertheless argues (Resp. Br. 31-32) that in the circumstances of this case an inquiry into the Commissioners' mental processes is appropriate because it has made a prima facie showing that the Commission ignored its statutory mandate by issuing the administrative complaint in response to extraneous political considerations and without making a determination of reason to believe that respondent had violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Indeed, this is the central theme of respondent's brief (see Resp. Br. 1-8, 11, 16-17, 19, 21, 33). It is plain, however, that respondent errs both as a matter of pleading and as a matter of law.

Respondent has not pleaded a prima facie case, even assuming, arguendo, that the reason to believe standard in Section 5 of the FTC Act defines a judicially enforceable criterion. At most, the complaint alleges that the Commission instituted an investigation of firms in the petroleum industry, but did not for 17 months thereafter *directly* investigate the acts and practices of respondent by examining its officers and employees or reviewing its records; that Senator Jackson on May 31, 1973, requested the Commission to prepare a report within 30 days concerning the relationship between the structure of the petroleum industry and the then current shortages of petroleum products; that the Commission furnished to the Senator its *Preliminary Federal Trade Commission Staff Report on its Investigation of the Petroleum Industry* (hereinafter "Staff Report") on July 6, 1973, together with a statement indicating that the report had not been collectively evaluated or approved by the Commission; that Senator

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that [respondent] violated the law, but political pressure on the Commission is so strong that we are voting to issue the complaint anyway'" (Resp. Br. 23). The only way that a reviewing court can be assured that such a document does *not* exist, of course, is to permit respondent discovery of the Commission's and of individual Commissioners' files concerning the deliberations. In fact, respondent requested such materials and numerous other documents in its "first request" for discovery and inspection in the district court (R. 56-59; "R." refers to the clerk's record in the court of appeals).

Jackson released the report on July 13, over the protest of the Commission; that on July 17, the Commission decided to issue its complaint; that the complaint was issued the following day, July 18, 1973; and that following the issuance of the complaint the Commission's staff sought extensive discovery to prepare the case for trial before an administrative law judge.

These allegations are simply insufficient to make out a case that the Commission did not exercise the required discretion and reasonably consider the facts in issuing the complaint, or that it improperly considered congressional pressures and political factors extraneous to an alleged violation of Section 5 of the FTC Act (J.A. 15). Thus, as a matter of law these allegations do not overcome the strong presumption against probing the minds of administrators concerning their deliberations. See *National Nutritional Foods Ass'n* v. *FDA*, 491 F.2d 1141, 1144-1146 (2d Cir. 1974) (Friendly, J.).

A. Respondent has sought to create the impression that no investigation of SOCAL preceded the Commission's decision to issue its administrative complaint in this case. This contention is incorrect. The record shows that there was an extensive prior investigation. Respondent's complaint in the district court alleges (J.A. 6-7) that "[o]n December 21, 1971, the FTC issued a resolution stating its intention to institute an investigation of firms in the petroleum industry to determine whether such firms were engaged in unfair methods of competition or unfair acts or practices in violation of section 5 of the Federal Trade Commission Act (Docket No. 721-0047)." The subsequent history of that investigation is recounted in the Staff Report that was transmitted to Senator Jackson by the Commission's chairman on July 6, 1971.[2]

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[2] The Staff Report was subsequently published as a committee print (J.A. 9). Permanent Subcomm. on Investigations, Senate Comm. on Government Operations, 93d Cong., 1st Sess., *Investigation of the Petroleum Industry* (July 12, 1973). The Report was included in an appendix to the Commission's petition for rehearing en banc in the court of appeals.

As described in the Staff Report (at 5–6), subpoenas were initially issued to nine integrated petroleum firms. They were withdrawn, however, because of fear that the investigation would be delayed by protracted litigation over the validity of the subpoenas.[3] Instead, the Commis-

[3] This concern was subsequently confirmed when the adjudicatory proceeding began. Some 13 collateral cases, not including this one, have resulted from the opposition of the respondent oil companies to preliminary aspects of the proceeding. *Standard Oil Company of Indiana* v. *FTC*, 475 F. Supp. 1261 (N.D. Ind. 1979) (challenge to the administrative law judge's denial of respondents' discovery requests); *FTC* v. *Anderson*, 442 F. Supp. 1118 (D.D.C. 1977), aff'd, 1979–2 Trade Cas. (CCH) ¶ 62,837 (D.C. Cir. Sept. 17, 1979) (challenge to enforcement of FTC subpoenas related to the *Exxon* proceeding); *Exxon Corp.* v. *FTC*, 476 F. Supp. 713 (D.D.C. 1979) (Freedom of Information request for *Exxon*-related documents); *Exxon Corp.* v. *FTC*, 466 F. Supp. 1088 (D.D.C. 1978) (same); *Exxon Corp.* v. *FTC*, 436 F. Supp. 1012 and 1019 (D. Del. 1977), remanded, 588 F.2d 895 (3d Cir. 1978) (respondents sought protective order for certain documents subpoenaed during the *Exxon* proceeding); *Mobil Oil Corp.* v. *FTC*, 430 F. Supp. 855 (S.D.N.Y. 1977), rev'd, 562 F.2d 170 (2d Cir. 1977) (respondents sought order compelling FTC to file an Environmental Impact Statement before proceeding with the *Exxon* administrative proceeding); *Mobil Oil Corp.* v. *FTC*, 406 F. Supp. 305 (S.D.N.Y. 1976); 430 F. Supp. 849 (S.D.N.Y. 1977) (Freedom of Information suit for *Exxon*-related documents); *Exxon Corp.* v. *FTC*, 411 F. Supp. 1362 (D. Del. 1976) (respondents objected to the administrative law judge's issuance of a preservation order); *Exxon Corp.* v. *FTC*, 384 F. Supp. 755 (D.D.C. 1974), remanded, 527 F.2d 1386 (D.C. Cir. 1976) (Freedom of Information request by respondents for *Exxon*-related documents); *Atlantic-Richfield Co.* v. *FTC*, 398 F. Supp. 1 (S.D. Tex. 1975), aff'd 546 F.2d 646 (5th Cir. 1977) (suit to prevent the FTC from issuing certain subpoenas duces tecum because the data may be used in the *Exxon* proceeding); *FTC* v. *Atlantic-Richfield Co.*, 567 F.2d 96 (D.C. Cir. 1977) (objection to enforcement of FTC subpoenas, in part because documents may be used in *Exxon* proceeding); *Appeal of FTC Line of Business Report Litigation*, 595 F.2d 685, 707–708 (D.C. Cir. 1978), cert. denied, 439 U.S. 958 (1978) (respondents opposed the line of business reports in part because the data may be used in the *Exxon* proceeding); *Standard Oil Company of Indiana* v. *FTC*, Civ. No. H–78–483 (N.D. Ind., filed June 24, 1980) (respondents in *Exxon* proceeding filed motion for further declaratory and injunctive relief).

A House Subcommittee which reviewed the case in 1976 charged "that many of the more than 100 pre-trial motions filed by respondents in the three years since the complaint was issued were without sub-

sion's staff used an alternative approach to gather data relating to the industrial practices of the major oil companies (Staff Report, at 5–6):

> The approach concentrated on obtaining information from the largest independent crude producers, refiners, and marketers. Extensive investigative work was done by the Commission staff which began with detailed questionnaires to crude producers, refiners, and marketers which were designed to elicit in depth the nature of the independents' relationships with major oil companies for the years 1967–1971, the last years in which complete data were available. In addition, a large number of firms in each category (crude producers, refiners, marketers) were requested to permit searches of their files by Federal Trade Commission economists and attorneys. Because not every company cooperated, data contained in this summary reflects only that which came from the more than 50 cooperating companies. Data were collected on a national basis, but it was later decided that the investigation should focus primarily on Districts 1 and 3 which could be identified as a separate identifiable market. In general, the surveyed firms were larger on the average than other independent entities in the industry.
>
> In addition to these data, the staff obtained substantial information on the petroleum industry from published public and governmental sources. The staff collected further valuable information from the Department of Interior, the Oil Import Appeals Board, the Interstate Commerce Commission, and other federal agencies. Various state taxing authorities and several state agencies such as the Texas Railroad Commission were contacted. These governmental agencies were cooperative in providing the requested information.

B. Respondent also seeks to create the impression (Resp. Br. 5–7) that, because the Commission's staff was

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stantial legal basis and were filed partly for the purpose of delay." Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess., *Federal Regulation and Regulatory Reform* 76 (Comm. Print 1976).

not ready to proceed to trial before an administrative law judge immediately upon issuance of the administrative complaint, the Commission necessarily lacked reason to believe that a violation had occurred within the meaning of Section 5(b) of the FTC Act. The amount of information necessary to constitute reason to believe, however, is quite different from the amount of evidence necessary to prove a violation in the adjudicatory proceeding.

Section 5(b) of the Act does not provide any firm guidelines concerning the nature or quantum of evidence upon which an individual Commissioner must rely in determining "reason to believe." Rather, the statute invokes the experience, judgment and practical expertise of each individual Commissioner. The Staff Report, which was available for study by the individual Commissioners for at least 11 days after its release to Senator Jackson (J.A. 8–9), provided ample grounds in and of itself from which the Commissioners could reasonably have concluded that the major oil companies had illegally combined to monopolize the refining of crude oil, to maintain a monopoly over refining, and to maintain, individually and with each other, a non-competitive market structure in refining. See Staff Report, at 43.[4] But such a conclusion would not necessarily mean that the charges were ready for trial on the day the complaint was issued. Extensive discovery was required, and was sought by the staff, in order to convert the Commission's "reason to believe" based upon an ex parte investigation of SOCAL and other major oil companies[5] into a prima facie case. Under the scheme of the Act, the Commission must ultimately decide, on the basis of the record made before the administrative law judge in adversary proceedings, whether the violations which it had reason to believe occurred, have in fact been proved by substantial evidence on the record as

[4] The violations charged in the administrative complaint are phrased only in terms of injury to competition in the refining aspects of the petroleum industry (J.A. 25–26).

[5] The staff investigation used the term "major" to include some 18 vertically integrated firms, including SOCAL (Staff Report, *supra*, at 5 n.8).

a whole.[6] *FTC* v. *Cement Institute*, 333 U.S. 683 (1948).

C. Respondent's case is not strengthened by its allegations of congressional "pressure" based on Senator Jackson's request for a report from the Commission and the Commission's decision to honor that request. Indeed, the Commission is expressly charged by statute with the duty of submitting reports at the request of Congress. Section 6(d), (f), 15 U.S.C. 46(d), (f). Nor do respondent's allegations concerning the timing of the complaint show that the Commission was acting under outside pressure and could not have been able to ascertain the relevant facts and make a reason to believe determination prior to the issuance of the complaint. Congress has not imposed a time frame within which the Commission must study the facts and determine whether there is reason to believe that a violation of law has occurred. Cf. *National Nutritional Foods Ass'n* v. *FDA*, *supra*. Although the Commission's chairman, in his letter transmitting the report to Senator Jackson, wrote that "[t]his report has not been evaluated or approved by the Commission" (J.A. 30),

[6] Respondent's confusion of the two concepts is reflected in its emphasis on statements by complaint counsel that they had not obtained substantive document or data discovery from the respondents prior to issuance of the complaint (Resp. Br. 6 n.5), and by its incomplete citation of Commissioner Dixon's statement concerning the Commission's "readiness" when the complaint was issued (Resp. Br. 7). The Commissioner was simply expressing his opinion that had extensive investigative subpoenas been issued before the filing of the administrative complaint, enforcement of such subpoenas would have been easier than enforcement of post-complaint subpoenas. He stated, somewhat colorfully: "There is a hell of a lot of difference between the judicial subpena [sic] and investigative subpena. We issued a complaint here without being ready is one way to say it. You have to get ready for trial. Now we are talking about whether we shouldn't change the whole process and duplicate the Federal Rules of Civil Procedure." *Regulatory Reform, Consumer Product Safety Commission, National Highway Traffic Safety Administration, Federal Trade Commission: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess., Vol. IV, 613 (1976). While it may be prudent practice to postpone the initiation of adjudicatory proceedings until a prima facie case has been developed, there is nothing in the FTC Act that mandates such a practice.

there is nothing in this letter or in any other material of record that suggests that individual Commissioners did not subsequently review the final report or that the Commission as a body had given no attention to the underlying data.

The remainder of respondent's allegations of "pressure" rest upon a newspaper article, prepared more than a year and a half after the events in question, that contains a statement, attributed to anonymous "congressional sources," that once the Staff Report was released the Commission was under "great political pressure to file a complaint" (J.A. 10, 36). While we do not deny that this article was in fact published, we submit that such a press report plainly does not suffice to overcome the presumption of regularity that attaches to the Commission's actions. Moreover, even if Senator Jackson or other members of Congress had urged the Commission to issue a complaint—and it is not alleged that they did—this would not be a proper basis for judicial review of the Commission's decision-making processes. As this Court stated in *Gravel* v. *United States*, 408 U.S. 606, 625 (1972), members of Congress "are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute * * *." Such "political pressure" is part of the give and take of our democratic system.

3. Respondent erroneously relies on dictum in *Marshall* v. *Jerrico*, No. 79-253 (Apr. 28, 1980), in support of its claim of reviewability. In *Jerrico*, the Court recognized (slip op. 10) that "[o]ur legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process, see *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973), and similar considerations have been found applicable to administrative prosecutors as well, see *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 414 (1958); *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967)." It noted (slip op. 11), however, that "[i]n appropriate circumstances the Court has made clear that traditions of prosecutorial dis-

cretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law."

This statement does not support respondent's position here. With respect to the "improper factors" noted by the Court in *Jerrico*, it is obvious that due process principles may require review, at an appropriate stage, of administrative proceedings motivated by such factors as willful discrimination on racial or religious grounds, or brought for the personal benefit of the prosecutor. Reviewability of enforcement decisions "otherwise contrary to law" depends on what the specific law alleged to have been violated provides, not, as respondent contends (Resp. Br. 12–14), on general presumptions of reviewability. Otherwise, nothing would remain of the tradition of broad prosecutorial discretion so carefully preserved in *Jerrico*.

Our reading of *Jerrico* is confirmed by the cases cited by the Court in support of its statement. *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), involved a statutory scheme (the Labor-Management Reporting and Disclosure Act of 1959) that required the Secretary of Labor either to file an action on behalf of disgruntled union members contesting an allegedly invalid union election, or to provide an adequate explanation of his refusal to proceed. Under the specific statutory scheme, the Secretary's refusal to act (or adequately to explain his refusal) had the effect of denying a specific right to individuals whom the statute was intended to benefit.[7] The denial of that right had an im-

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[7] Respondent contends (Resp. Br. 27–28) that the analysis of *Bachowski* in our opening brief (at 38–39) is erroneous. We disagree. While the Court in *Bachowski* held that the Secretary had "a heavy burden of overcoming the strong presumption that Congress did not mean to prohibit judicial review of his decision" (421 U.S. at 567), the Court was there addressing the Secretary's contention that the provisions of the LMRDA precluded judicial review, pursuant to 5 U.S.C. 701(a)(1). With respect to the contention that the decision not to file an action was an unreviewable exercise of prosecutorial discretion, the Court agreed with the reasoning of the court of appeals, which had rejected that contention. 421 U.S. at 567 n.7.

mediate and conclusive impact upon those protected individuals. That is not ordinarily true of an administrative decision to initiate a proceeding.

Similarly, in *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125 (1939), the Court held reviewable a final determination of the jurisdictional status of a telephone common carrier. Writing for the Court, Mr. Justice Frankfurter observed that under traditional notions of judicial power, review of an administrative determination that does not of itself affect an individual "but only affects his rights adversely on the contingency of future administrative action" is either premature or wholly beyond the province of the courts. 307 U.S. at 130. As an example, he noted that "orders of the Interstate Commerce Commission setting a case for hearing despite a challenge to its jurisdiction * * * are not reviewable." *Ibid.*; footnote omitted.[8]

This case involves a challenge to the initiation of an administrative proceeding. The initiation of such a proceeding does not have a dispositive effect upon protected legal rights. It merely begins a process. Unlike the statute in-

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[8] None of the other cases cited in *Jerrico* as illustrations of situations in which enforcement decisions are reviewable involved review of the decision to initiate an administrative proceeding. See *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (reviewability of HEW Secretary's failure to carry out the mandate of Title VI of the Civil Rights Act); *Environmental Defense Fund* v. *Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971) (reviewability of refusal by EPA Administrator to initiate proceedings to cancel a permit for the distribution of an allegedly dangerous pesticide); *Medical Comm. for Human Rights* v. *SEC*, 432 F.2d 659 (D.C. Cir. 1970), vacated as moot, 404 U.S. 403 (1972) (reviewability of refusal by SEC to act on complaint by stockholders that their rights under Section 14 of the SEC Act were being violated); *Perez* v. *Boston Housing Authority*, 404 N.E. 2d 1231 (Mass. 1980) (power of equity court to appoint receiver to vindicate rights of tenants in a Public Housing Authority building project after the authority had demonstrated an institutional inability to comply with the court's orders).

volved in *Dunlop* v. *Bachowski*, *supra*, Section 5(b) of the FTC Act is not drawn in terms of specifically defined protections for the benefit of individuals or a defined class. Rather, the statute expressly provides for the vindication of broad societal interests.[9] Under the statute, the Commission is charged with the sole responsibility of initiating or declining to initiate proceedings. See, *e.g.*, *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 414 (1958); *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244 (1967). Subject only to due process safeguards against invidious discrimination and similar improper behavior, its determinations in this respect are committed to its unreviewable discretion. *Ibid.*

[9] As we noted in our opening brief (at 27), "reason to believe" is one of two factors to be considered by the Commission under Section 5(b) of the FTC Act in issuing an administrative complaint. The other factor is whether the proceeding is in the "public interest." This factor is reviewable only to the extent of establishing that the controversy is not a mere private dispute. *FTC* v. *Klesner*, 280 U.S. 19, 24–25 (1929). Moreover, such review is available only after the issuance of a cease and desist order at the conclusion of the administrative process. Beyond this limited inquiry, however, the public interest determination is not reviewable at all, since it is the Commission, not the courts, which is responsible for determining the public interest. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *Hills Bros.* v. *FTC*, 9 F.2d 481 (9th Cir.), cert. denied, 270 U.S. 662 (1926); *Jewel Companies, Inc.* v. *FTC*, 432 F.2d 1155, 1160 (7th Cir. 1970).

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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